National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

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United Catalysts, Inc., Cases 9-CA-25608-2, 9-CA-25738, 9-CA-25761

240-3367-0401, 240-3367-0800

These Section 8(a)(1) and (5) cases were submitted for advice as to whether the charges should be deferred to arbitration under Collyer Insulated Wire,[(1)] where the alleged unilateral changes occurred after the expiration of the parties' collective-bargaining agreement.

FACTS

The Union represents the Employer's production and maintenance employees at its Louisville, Kentucky facility. The collective-bargaining agreement between the parties expired on April 30, 1988. The grievance-arbitration provision of the expired agreement defined a grievance as "a difference. . . with reference to the application or interpretation of the terms of this Agreement...." The provision gave an arbitrator "jurisdiction and authority only to interpret, apply or determine compliance with the provisions of this Agreement. . . ."

In June 1988 the Employer made the following alleged unilateral changes that formed the basis of the instant charges: (1)it purchased a new "G84 screen," which increased production capacity and caused the Employer to increase the production quota of each employee from three boxes per employee/per shift to four boxes per employee/per shift; (2) it has forced "upgrades" on employees, allegedly in violation of the expired agreement[(2)] and has changed the bidding procedure for vacant positions by using "upgraded" employees rather than by opening the vacancy for bidding by employees within the job classification; and (3) it has been assigning utility operators to perform maintenance work.

In addition, complaint has already issued in Case 9-CA-25608-2, alleging that, on or about July 20, 1988, the Employer violated Section 8(a)(5) by unilaterally instituting a system of logging the number of "batches" produced by each crew and instituting a quota for batches, accompanied by discipline or the threat of discipline for failing to meet the quotas.

The Employer has defended each of these practices by pointing to provisions in the expired agreement that it claims provide authority for its actions. The Employer has indicated a willingness to arbitrate the disputes.

ACTION

As none of the disputes arose under the expired agreement, the matters are not arbitrable. [*FOIA Exemption 5*] and should issue a Section 8(a)(5) complaint, absent settlement, in Cases 9-CA-25738 and 25761 if it finds merit to those charges.

In Nolde Bros. v. Bakery Workers Local 358, 430 U.S. 243 (1977), the Court held that parties to a collective-bargaining agreement will be presumed to have intended to arbitrate all grievances "arising under" an expired contract, absent an express or clear implication to the contrary. Id. at 249, 255. In Indiana & Michigan Electric Co., 284 NLRB No. 7 (May 29, 1987), the Board held that it would find "that a dispute based on postexpiration events 'arises under' the contract within the meaning of Nolde only if it concerns contract rights capable of accruing or vesting to some degree during the life of the contract or remaining enforceable after the contract expires." Id., slip op. at 21. The Board expressly overruled prior case law insofar as it suggested "that the mere invocation of any term of the expired contract triggers the postexpiration duty to arbitrate under

Nolde." Id., slip op at 22, n.9. (3)

In the instant case, the disputes did not arise under the contract. In other words, none of the claims rest on contract rights that vested or accrued under the expired contract, and none involve rights that were enforceable after expiration of the contract.(4) We recognize that the Employer has invoked defensively the management rights clause. However, this is an insufficient basis for finding a duty to arbitrate under Indiana & Michigan Electric, supra. In addition to the fact that management rights do not ordinarily accumulate over time, "there is no other indication that the parties contemplated that such rights could ripen or remain enforceable even after the contract[s] expired."(5) Indeed, insofar as a management rights clause contains a waiver of union bargaining rights, the waiver would end with the contract, absent clear and unmistakable evidence to the contrary. Thus, the "mere invocation" of the management rights clause of the expired contract would not trigger a post-expiration duty to arbitrate.

Accordingly, as the disputes herein do not arise under the expired contract, the parties do not have a duty to arbitrate these disputes. Thus, the Region [*FOIA Exemption 5*] should determine the merits of the charges in Cases 9-CA-25738 and 25761.

H.J.D.

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[1] 192 NLRB 837 (1971)

[2] Apparently, these disputes all involve employees who had been "downgraded" to lower classifications. The expired agreement permitted the Employer to fill temporary vacancies "through upgrading, overtime, transfer or assignment of other employees, on the shift, as determined by the Company." It further stated that [e]mployees who have been downgraded to a lower level. . . shall be given first consideration, if the temporary vacancy is in a classification previously held by such employee(s)." In making permanent assignments, Article VII of the expired agreement assigns the controlling factor to seniority "where skill and ability are relatively equal."

[3] See also United Chrome Products, 288 NLRB No. 130, slip op. at 4, n.4 (May 31, 1988).

[4] Insofar as the Employer may have been making permanent assignments when it upgraded employees, seniority may have been a factor in those decisions, and such seniority may be an aMccrued right. However, the Board has ruled that such a provision does not give rise to an obligation to arbitrate. Compare United Chrome Products, Inc., supra, (recall grievances arbitrable after expiration of the contract where recall rights depend solely on seniority) with Litton Financial Printing, 286 NLRB No. 79 (Nov. 6, 1987) (layoff grievances not arbitrable after expiration of the contract, which provided that seniority would be the determining factor in layoffs only if "subjective factors such as 'aptitude' and 'ability' that remain within the control of an employer" were equal). See discussion in United Chrome Products, 288 NLRB No. 130, slip op. at 4-6.

[5] Indiana & Michigan Electric, 284 NLRB No. 7, slip op. at 23.